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**Collaboration: What's In It For Environmentalists?**

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**1. Paper Wars in Regulation of Resource Uses.**

- 1.1. Administrative agencies make nearly all decisions for resource uses. Examples include: Federal Energy Regulatory Commission (FERC) for hydropower projects, or a state's water board for water rights.
- 1.2. An application to a permitting agency must comply with statutory minimums for approval.
- 1.3. Typically, an application exceeds minimums. Agency has discretion whether to approve, and more importantly, how to condition approval for protection of environmental quality.
- 1.4. Applicant has burden of proof on disputed issues of fact under Administrative Procedures Act, NEPA, and other laws. Applicant submits study results as element of application, effectively shifting burden to other participants.
- 1.5. A federal or state permitting agency rarely holds an evidentiary hearing on disputed issues of fact in a permit proceeding. Under *ex parte* rule, the applicant and other participants may not meet directly with agency staff once the proceeding has started. As a result, disputed issues are resolved behind the agency's closed doors on the basis of staff's assessment of record.

- 1.6. Environmentalists are typically at risk of losing the paper war with the applicant in a permit proceeding. We are outspent and reactive to applicant's evidence and arguments.

## **2. Collaboration as an Alternative to Paper Wars.**

- 2.1. In past decade, many permitting agencies have become supportive of collaboration as an alternative to paper wars in their proceedings. FERC now has formal policy that a settlement between applicant and other participants is the preferred basis for a licensing decision for a hydropower project. Since 1997, settlements have been submitted and approved in more than two-thirds of such proceedings.
- 2.2. This trend reflects general recognition that collaboration means:
  - 2.2.1. Less expenditure by applicant on studies, potentially increasing funding for actual mitigation;
  - 2.2.2. Less expenditure by agency staff in trying to resolve disputed issues; and
  - 2.2.3. Less risk of appeal of final decision.

## **3. Benefits of Collaboration for Environmentalists in Resource Management Decisions.**

- 3.1. Regulatory process which is collaborative allows applicant and environmentalists to focus on resolving disputes, rather than developing evidence and arguments.
  - 3.1.1. This benefit occurs if the collaborative process is properly structured. (Otherwise, it could become another war of attrition.) Recommended structure includes:
    - A. Openness to all interested stakeholders;

- B. Adoption of schedule for entire process, including target deadlines for all steps;
- C. Use of committees to focus on specific issues, so that plenary committee may integrate;
- D. Study plan or other joint method to develop data to resolve disputed issues of fact;
- E. One-text drafting of settlement or other prior document. Any participant may draft any given round, and others will edit – and so forth serially until the document is done.

3.1.2. A second benefit of collaboration is settlement or other formal resolution of disputed issues of law and fact in a permit proceeding. This may be submitted to regulatory agency as basis for final decision.

- A. Settlement may include proposed conditions for approval by regulatory agency. The signatories commit not to appeal final decision which incorporates these proposed conditions.
- B. Settlement may be comprehensive, resolving all disputes between applicant and other participants, not just those over which the regulatory agency has jurisdiction. The non-jurisdictional obligations are enforceable by contract.
- C. Settlement may provide for ongoing cooperation of applicant and other participants in implementation of approved permit. This permits long-term adaptive management of the mitigation measures in response to uncertainty or changed environmental conditions, including climate change.
- D. I have attached two settlements which have these elements. The first is the 2003 settlement for the Fish and Aquatic Habitat Collaborative Effort, which resolved a water right dispute involving the Santa Clara County Valley Water District (San

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Jose, CA). The second is the 2005 settlement in the relicensing proceeding for Dominion Generation's Roanoke Rapids-Lake Gaston Project (NC).